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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AD HOC GROUP OF STATE EDUCATION OFFICIALS, SCHOOL ADMINISTRATORS, AND SCHOOL BOARD MEMBERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD J. LARSON
WILLIAM H. ELLIS
(Counsel of Record)
MICHAEL E. RITCHIE
ELLIS & LI
2110 Exchange Building
Seattle, WA 98104
(206) 682-0565
Attorneys for Amici Curiae

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QUESTION PRESENTED

May public school officials permit student-initiated religious groups to meet at a high school on the same basis as other student-initiated groups?

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are individuals serving with state or local public school agencies in an official administrative, executive, or supervisory capacity. Each bears the direct or shared responsibility of applying and enforcing federal and state Constitutional and legal requirements in the administration of public schools. A more particular description of each individual *amicus curiae* is provided below. Except as otherwise noted, each *amici* appears

before this Court in his individual capacity and not as the representative of any state or local public school agency.

Amici do not lightly seek leave to appear before this Court. However, the decision below would require public school administrators to discriminate against students who wish to use public school facilities for student-initiated meetings considered to have religious content. Your *amici* would be forced into the role of applying and enforcing this discrimination.

Many of your *amici* serve in an official capacity for public secondary schools where student-initiated religious groups have been permitted to meet on the same basis as other student-initiated groups. Those *amici* have found such a policy to be fair, easily administered, and favorably accepted by students and the public. Based on our experience as school administrators, all of your *amici* believe such a non-discrimination policy to be conducive to a positive public school environment and an appreciation by students of their Constitutional freedoms. Properly administered, we foresee no undue danger that such a policy will create either the fact or appearance of an establishment, endorsement or sponsorship of religion by public schools.

Your *amici* are deeply concerned about the administrative legal dilemma created by the decision below. Many public school districts have faced legal action for ruling that student-initiated religious groups either could *or* could not meet at public schools on the same basis as the student-initiated groups. The decision below prohibiting school meetings by such religious groups further complicates matters for public school administrators by forcing them to rule in advance whether a proposed student-initiated meeting will be impermissibly religious and then to monitor ongoing student-initiated meetings to insure they do not become impermissibly religious. Threats of litigation would hang over these difficult ad-

ministrative decisions. In contrast, an impartial policy toward meetings of all student-initiated groups minimizes these administrative and legal concerns. We welcome such a nondiscriminatory policy.

Your *amici* are as follows:

Gary C. Newbill appears in his official capacity as Superintendent of the Vashon Island School District No. 402, Vashon, Washington. Superintendent Newbill has served as Assistant Superintendent (1982-84) and Director of Personnel (1979-82) for Issaquah School District No. 411, Issaquah, Washington; Adjunct Professor in education at the University of Washington (1977-78); General Counsel for the Northshore School District No. 417, Bothell, Washington; and a high school social studies teacher for the Shoreline Public Schools, Seattle, Washington. Superintendent Newbill holds a law degree from the University of Washington.

Charles Glenn is Director of the Bureau of Equal Educational Opportunity, Massachusetts Department of Education. Dr. Glenn holds a doctorate in educational administration from Harvard University and has taught classes there and at Boston University on civil rights issues in education. He has extensive experience in developing and implementing school desegregation plans as a consultant for several state agencies, the federal court, the Education Commission of the States, and the federal Department of Education.

Clifford W. Campbell is Superintendent of Quilcene School District No. 48, Quilcene, Washington. Dr. Campbell has served as Superintendent of Dixie School District, San Rafael, California (1969-78); a public school principal, vice principal, and teacher (1959-69); and a State Board member of the Washington Association of School Administrators. Dr. Campbell holds a doctorate in school administration from the University of Southern California.

Robert J. Sterrett is Principal of Greenway High School, Greendale Union High School District, Phoenix, Arizona. Mr. Sterrett has served as the Principal of Greenway High School for twelve years and a public school administrator for fifteen years.

Lawrence E. Neigel is President of the Board of Education for the San Bernardino City Unified School District, San Bernardino, California. Mr. Neigel has served in his present post for two years, preceded by two years as Vice President of the same Board, with a total of eight years as a Board member. San Bernardino City Unified School District serves over 30,000 students and maintains three high schools.

Helen Nelson is Director of Professional Personnel Services for the Boone-Winnebago Counties Regional Office of Education, Rockford, Illinois. Prior to assuming her current position, Ms. Nelson had 19 years experience as a public school principal.

Stan Scheer is Assistant Superintendent, Division of Administrative Services of the Wyoming State Department of Education. Dr. Scheer holds an Ed.D. from the University of Wyoming and has served as an Assistant Superintendent for public school districts in Eaton, Colorado and Douglas, Wyoming.

Gerald A. Rosander has served as San Diego County Superintendent since 1976. Mr. Rosander's office provides programs and services to forty-five public school districts and five community colleges in San Diego County. These programs enroll over a half million students. Prior to assuming his present position, Mr. Rosander served as a teacher and administrator for the Fresno Unified School District, Fresno, California.

Virgil Don Loftis is Superintendent of Hamilton County Schools, Chattanooga, Tennessee. Dr. Loftis holds

an Ed.D. degree in school administration and higher education from the University of Alabama.

James Martin currently serves as Dean of the Arrowhead High School (North Campus), Hartland, Wisconsin. Mr. Martin has 30 years experience as an educator, with the last 22 years as a high school administrator.

Charles E. Nunley has served as a public school superintendent continuously since 1958, and currently holds that position for the Arlington Public Schools, Arlington, Virginia. Prior to becoming a superintendent, Dr. Nunley had experience as a classroom teacher and school principal. Dr. Nunley holds an Ed.D. from the University of Akron and has served as state president for a school administrator group.

Blanche J. Martin is Superintendent for the Boone-Winnebago Counties Regional Office of Education, Rockford, Illinois. Ms. Martin has held her current post for six years, preceded by thirteen years as a public school principal, and fifteen years as a classroom teacher.

Barbara Peters is serving her second three-year term on the Kettle-Moraine School Board, Wales, Wisconsin. Ms. Peters represents her board to the Wisconsin Association of School Boards.

Philip A. Stough is Assistant Principal for Student Affairs at Wheaton High School, Wheaton, Illinois. Mr. Stough has served in public education for twenty-three years. For the past ten years his responsibilities as Assistant Principal have included oversight of student clubs, student extracurricular activities and other student affairs.

Abe K. Ogden is a member of the Board of Trustees of the Southern Kern Unified School District in Rosamond, California. Mr. Ogden is currently in his fourth consecutive term on the Board, representing fourteen years of service.

Carleton J. Dubois is Superintendent of Schools of Maine School District No. 22, Hampden, Maine. Mr. Dubois has served twenty-three years in public education of which fifteen years have been in administration and eight years in his present position.

Luke Thornton is Principal of John I. Leonard High School, Lake Worth, Florida. Mr. Thornton has served twenty years in school administration of which ten years have been as a senior high school principal.

Ken Overstreet is a member of the Governing Board of the Grossmont Union High School District, La Mesa, California. He has served sixteen years in this capacity. This district serves a high school population of over 19,000 students and maintains nine high schools.

Jerry O. Petrie is Principal of R. Nelson Snider High School, Fort Wayne, Indiana, and has served in this capacity thirteen years. He has served eighteen years in public school administration.

Wilford L. Ottey is Superintendent of Schools, Bangor Area School District, Bangor, Pennsylvania. Dr. Ottey has served twenty-one years in public school administration of which four years have been as a school superintendent. Dr. Ottey holds a doctoral degree in educational administration from the University of Pennsylvania.

STATEMENT OF THE CASE

Amici curiae adopt and incorporate by reference the statement of the case appearing in the brief filed by the petitioners Michael Bender, *et al.*

SUMMARY OF ARGUMENT

School officials can simply and fairly administer a policy of permitting meetings at public high schools by student-initiated religious groups on the same basis as meetings by other student-initiated groups. Such a policy allows school officials to teach by example the meaning of our

Constitutional freedoms. It also promotes public education by accommodating students' spiritual needs. Uniform time, place, and manner restrictions could be imposed on all student-initiated groups to insure secular school goals are advanced. Additional reasonable requirements could also be employed in the case of student-initiated religious meetings to dispel any misperception of school endorsement. In contrast, a discriminatory rule prohibiting student-initiated religious meetings invites continued legal and public controversy by forcing school officials to make difficult decisions about what is and is not religious.

ARGUMENT

I. Permitting Student-Initiated Religious Meetings at Public High Schools on the Same Basis as Other Student-Initiated Meetings Will Resolve a Serious Dilemma Confronting Public School Officials.

Public school officials are constrained to respect the Constitutional rights of students or else face legal action. *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969) ("School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution."). The dual question for public school officials then is: (1) What Constitutional rights do their students possess? and (2) How must those rights be accommodated in light of the special characteristics of the public school environment? *Id.* at 506. A wrong answer or a close call in any particular situation can lead to costly litigation. In many areas (such as the political expression involved in *Tinker*) school officials face little risk of litigation if they lean on the side of an expansive interpretation of students' rights. This cushion has not existed for student-initiated religious expression, where the Establishment Clause and the Free Speech Clause of the Constitution

lie like Scylla and Charybdis threatening to devour school officials.

Lawsuits and threats of litigation have dogged school officials when deciding (either way) whether or not student-initiated religious groups can meet at public schools on the same basis as other student-initiated groups. Public school officials allowing such meetings have been sued by disgruntled individuals and organizations for violating the Establishment Clause in Lubbock, Texas; Little Axe, Oklahoma; and Clayton County, Georgia.[1] Public school officials denying access for such meetings have been sued by students for violating students' freedom of speech in Guilderland, New York; Houston, Texas; and in the present case from Williamsport, Pennsylvania.[2] Such lawsuits can be costly to the school district and disruptive of both the academic program and community support for the school. Though the federal Equal Access Act, 20 U.S.C.A. § 4071-74 (West), provides some definite guidance for school officials on this issue, a clear ruling from this Court stating that student-initiated religious groups have a Constitutional right to meet at public schools on the same basis as student-initiated non-religious groups is needed to resolve the dilemma confronting school officials. Such a ruling by this Court for public post-secondary schools in *Widmar v. Vincent*, 454 U.S. 263 (1981), effectively resolved a parallel legal problem for college and university officials.

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[1] *Lubbock Civil Liberties Union v. Lubbock Independent School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Bell v. Little Axe Independent School Dist. No. 70*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *appeal docketed*, No. 83-1458, 83-1493 (10th Cir. 1983); and *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984).

[2] *Brandon v. Guilderland Bd. of Educ.*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) and *Amidei v. Spring Branch Independent School Dist.*, Civil No. H-84-4673 (S.D. Tex. Apr. 26, 1985).

II. Permitting Student-Initiated Religious Meetings at Public Schools on the Same Basis as Other Student-Initiated Meetings is a Viable, Workable Solution to the Dilemma Confronting School Officials.

As discussed below, a policy of permitting student-initiated religious groups to meet at public schools on the same basis as other student-initiated groups would allow school officials to deal simply and impartially with student demands for such meetings. In contrast, prohibiting meetings by such groups would further complicate the legal difficulties confronting school officials.

A. *Prohibiting Student-Initiated Religious Meetings Would Force School Officials to Rule in Advance on What Constitutes Impermissibly Religious Speech and Activities.*

A restrictive policy prohibiting meetings at public schools by student-initiated religious groups thrusts school officials into a continuing role of deciding which groups are religious and which are not. Is a church or synagogue-related student-initiated group inevitably religious even though the group declares that it wishes only to discuss social issues? Is the local chapter of the nationwide student "Hi-Y" group imputedly religious because it is associated with the Young Men's Christian Association? Does an otherwise purely secular student group become religious because its student leaders open meetings with prayer or observe a religious holiday? Is a student yoga, astrology, or "Dungeons and Dragons" club religious due to the spiritualistic aspects of its activity?

These questions and countless others like them confront school officials who are forced to exclude student-initiated religious groups from the benefits conferred on other student-initiated groups. The dilemma is made all the more difficult because it involves making a decision *in advance* on the content of speech and activities at

future meetings. School officials would face the continuing threat of litigation for their decisions. Students from *ex*cluded groups could charge that their group is *not* impermissibly religious. Individuals and organizations opposed to *in*cluded groups could allege that those groups *are* indeed impermissibly religious. The current dilemma would continue, albeit in the different guise of which groups are and are not impermissibly religious.

B. *Prohibiting Student-Initiated Religious Meetings Would Force School Officials to Monitor Speech and Activities at Student Meetings.*

A restrictive policy prohibiting religious meetings at public schools by student-initiated groups requires school officials not only to make decisions in advance about the content of meetings, but also to monitor speech and activities at meetings to insure that approved meetings do not become impermissibly religious. It is one thing to supervise activities by teachers and other individuals at official public school activities to insure those school activities remain within school objectives and do not become religious in violation of the Establishment Clause. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948). It is quite another thing to monitor conversations by students at voluntary, student-initiated, non-school-sponsored activities where official school personnel may not even be present.

If arguably religious speech or activities were alleged to occur at meetings of a student-initiated group, school officials would be forced to decide whether such speech or activity had occurred and was impermissibly religious, and whether the group could continue to meet. Again, school officials would face the threat of litigation whatever their decision. Such tough decisions for public school officials would be avoided by a policy of allowing all student-initiated groups the same access to school facilities. Just such relief was provided for public post-secondary school officials by the *Widmar* decision.

C. *Permitting Student-Initiated Religious Meetings on the Same Basis as Other Student-Initiated Meetings Gives School Officials the Discretion Necessary to Maintain Order and Discipline.*

A permissive policy allowing student-initiated religious groups the same access to public school facilities as other student-initiated groups leaves school officials with ample authority to preserve an academic environment and to control disruptive activities. The key to this control is that religious and non-religious groups would be treated impartially. Any risk of disruption from non-school persons attending student meetings could be dealt with by uniform, content-neutral restrictions on the character or frequency of their attendance. Uniform, content-neutral restrictions could also be imposed on all student groups requiring parental consent for participation. School officials would be free to shape such content-neutral restrictions to the administrative needs of their school. The threat of litigation would be minimized because any restriction would be based on objective, content-neutral standards *wholly* independent of Constitutionally suspect considerations tending either to restrict free speech or to promote religious establishment. Such content-neutral "time, place and manner" restrictions on Constitutionally protected speech were authorized by this Court in *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), and applied to the public school setting by *Tinker*, 393 U.S. at 513.

A permissive policy allows school officials to treat all student-initiated groups impartially. A school official could always prohibit all meetings by student-initiated groups where, on balance, it was determined that such groups do not further secular school objectives. Uniform time, place, and manner restrictions could be imposed on all groups to insure secular school goals are advanced. Such content-neutral decisionmaking (which avoids decisions over what is and is not impermissibly religious) represents the proper role for public school officials.

D. *School Officials Can Apply Clear, Court-Imposed Limits on Student-Initiated Religious Meetings.*

Even if this Court enunciated certain limiting principles on student-initiated religious meetings at public schools, such a policy would be preferable to a ban on such meetings altogether. As discussed above, such a blanket ban would force school officials to decide what is and is not impermissibly religious and then monitor ongoing activities to insure that sanctioned groups do not cross the line—with the threat of litigation hanging over each decision. Clear reasonable limitations on the student-initiated religious groups need not create the same threat of litigation.

One such limitation could restrict the nature of participation by school personnel in student-initiated religious meetings if this Court concluded that some forms of participation might "confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. Reflecting this concern, the Equal Access Act allows public school officials to choose to limit participation of school personnel at student-initiated religious meetings even where such limits do not apply to other student-initiated meetings. 20 U.S.C.A. § 4071(c)(3) (West); and 130 *Cong. Rec.* S8342-43 (daily ed. June 27, 1984) (remarks of Sens. Hatfield and Gorton). Although such a restriction requires school officials to decide which student-initiated groups are religious if teacher participation is desired for meetings of non-religious groups, public school officials can somewhat freely limit teacher participation for questionable groups without a realistic threat of litigation. *See National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1274 (1984), *aff'd*, 53 USLW 4408 (1985) ("We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry."). The Court could declare principles imposing

Constitutional restrictions on participation by school personnel like those suggested by Congress in the Equal Access Act.

The Equal Access Act, moreover, applies only to secondary schools and a similar qualification could be imposed by this Court as a Constitutional requirement here. 20 U.S.C.A. § 4071(a) (West). Federal courts sometimes apply Constitutional rights differently for secondary students than for elementary students. *E.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1540 (9th Cir. 1985) (differentiating between the sophistication of elementary and secondary school students as a factor in applying Establishment Clause protections). Justice Stewart of this Court has observed that young age may be a factor in determining the extent of an individual's Constitutional rights. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).[3] As a factual matter, the present case solely involves secondary school students. Recognizing here that the Constitutional rights announced in *Widmar* for public post-secondary school students extend to public secondary school students (rather than to all public school students) would still provide an enforceable bright-line standard resolving most of the current dilemma confronting public school officials. Student-initiated groups rarely exist at the elementary school level. Further, the above-identified litigation arising from decisions to grant or to deny access to student initiated religious groups has focused on secondary school students.[4]

Thus, if this Court determines that the Constitution requires certain clear limits on student-initiated religious groups at public schools (such as a restriction on teacher

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[3] *But see Tinker* where this Court apparently interpreted the Constitutional protections for free expression as applying equally for public school students "from kindergarten through high school." 393 U.S. at 516 (Black, J. dissenting).

[4] This litigation is cited in footnotes 1 and 2, *supra*.

participation or application only to secondary schools) school officials could, as a practical matter, readily impose such limitations while still avoiding an unreasonable risk of litigation. Indeed, distinctions either involving supervised school personnel or based on the type of school are easily administered.

III. School Officials Can Teach the Proper Balance Between Freedom of Speech and Establishment of Religion By Allowing Student-Initiated Religious Groups to Meet on the Same Basis as Other Groups.

A policy of granting all student-initiated groups the same access to school facilities provides a vehicle for public school officials to teach *by word and deed* the proper balance between the various First Amendment rights. Students testifying before Congressional committees in favor of the Equal Access Act expressed their confusion over why religious speech was singled out for restriction at meetings of student-initiated groups. *See, e.g., Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong. 37-38 (1983) (statement of Bonnie Bailey); and *Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 98th Cong. 52-54 (1984) (statement of Lisa Bender Parker).

School officials are capable of teaching the proper balance between allowing the freedom of speech and preventing the establishment of religion by permitting student-initiated groups to meet at public schools for religious expression on the same basis as for other expression while, at the time time, not sponsoring that religious expression. Students could then fully exercise their freedom of speech whenever their school creates a forum or opportunity for student-initiated groups. The imperative for such an exemplary recognition of students' Constitutional rights by public schools officials was noted

by this Court stating, "That they [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia v. Barnette*, 319 U.S. 624 , 637 (1943).

IV. Granting Student-Initiated Religious Groups Access to Public School Facilities Promotes Public Education.

A Constitutional freedom allowing student-initiated religious groups the same access to school facilities as other student-initiated groups permits public schools to accommodate the needs of some students for personal religious intercommunication during the school day. See *Tinker*, 393 U.S. at 312 ("The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.") Without such accommodation, the families of some of those students might have their children attend private schools or be schooled at home. This, in turn, potentially reduces the constituency of and support for public education. By allowing public schools to accommodate legitimate student needs to the full extent Constitutionally permissible, permitting student-initiated religious group meetings at public schools promotes public education.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Court of Appeals below and establish a Constitutional policy permitting meetings by student-initiated religious groups at public high schools on the same basis as meetings by other student-initiated groups.

Respectfully submitted,

EDWARD J. LARSON
WILLIAM H. ELLIS
(Counsel of Record)
MICHAEL E. RITCHIE
ELLIS & LI
2110 Exchange Building
Seattle, WA 98104
(206) 682-0565
Attorneys for Amici Curiae

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